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No. 08-852

Supreme Court, U.S.
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In The
Supreme Court of the United States

SARAH ILLIG and GALE ILLIG
(for themselves and as representatives
of a class of similarly situated persons),

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Counsel certifies that only one petitioner is a corporation with a parent corporation or is a corporation ten percent or more of whose stock is owned by a publicly held corporation. Specifically, Albaca, Inc., is either the parent corporation of petitioner Sunset Memorial Park, Inc., or a publicly held company that owns ten percent or more of the stock of petitioner Sunset Memorial Park, Inc.

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ARGUMENT

The consequences of the Federal Circuit's error are substantial and reach not only takings claims arising under the Trails Act but all takings claims regardless of how they arise. The blanket rule invented by the Federal Circuit and promptly embraced by the government has pervasively frustrated the Court of Federal Claims' ability to resolve Trails Act takings claims in a predictable and efficient manner, and will continue to do so if allowed to stand.

I. The Decision Below Conflicts with This Court's Decisions and Is Erroneous

The government's position violates the most basic principle of takings law: a taking occurs only if a government act actually interferes with a property right. Petition for a Writ of Certiorari ("Pet.") 17-22. The government does not deny that principle, but asserts, "[P]etitioners do not dispute that the preclusion of reversionary interests on which their takings claim rests occurred immediately upon issuance of the NITU." Br. for the United States in Opp'n ("Opp.") 13. That is obviously incorrect. The core of petitioners' argument is that the interference for which they seek compensation did not occur, and could not have occurred, until MoPac's railroad easement was converted to trail use pursuant to the trail-use agreement. Not until then did 16 U.S.C. § 1247(d) preempt the abandonment of the easement that would have occurred under Missouri law as a

result of the conversion. Under the government's view, petitioners' takings claim accrued before the conversion and thus before the operation of section 1247(d) – which is to say, before a government act actually interfered with the particular property right for which petitioners seek compensation. That result violates not only basic takings law, but also the rules of standing and ripeness, and, as Judge Bruggink said, "throws [the question of] damages into a cockeyed hat." Pet. 21-22, 35-37; App. 126a-28a.

Ignoring most of petitioners' arguments, the government ultimately rests its defense of the decision below upon a single incorrect proposition: that the taking for which petitioners seek compensation occurred when the NITU issued because "issuance of the NITU is the event that 'trigger[s] [the] process'" by which "'a trail-use agreement is reached and abandonment of the right-of-way is effectively blocked.'" Opp. 14 (quoting *Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004)). The government's argument justifies neither the Federal Circuit's bright-line rule that a Trails Act takings claim accrues when the NITU issues, nor its application of that rule here.

A. Determining when petitioners' Trails Act takings claim accrued first requires identifying which government act interfered with which property interest. The Trails Act provides: "interim [trail] use shall not be treated, for purposes of any law or rule of

law, as an abandonment of the use of such rights-of-way for railroad purposes." § 1247(d). Thus section 1247(d) does not preempt state-law property interests until the railroad easement would be deemed "abandoned" under state law as a result of its conversion to interim trail use – as this Court has recognized. *Preseault v. ICC*, 494 U.S. 1, 8 (1990) ("By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law....") (citation omitted). And that does not occur until the railway and trail operator execute a trail-use agreement. *Id.* at 7 & n.5 ("If the parties reach agreement, the land may be transferred to the trail operator for interim trail use"). When section 1247(d) preempts the state-law abandonment that would occur upon the easement's conversion to trail use, it creates a new easement – one for trail use. But for the operation of section 1247(d), there would be no easement, only a trespass by the trail operator. The creation of an easement is a permanent physical occupation and therefore a *per se* taking of property. Pet. 28.[1]

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[1] Although, as the government notes, Opp. 7-8 & n.3, this Court did not decide in *Preseault* that a taking had actually occurred, the Court clearly concluded that a taking would occur if the railroad easement would terminate under applicable state law upon conversion to trail use but for the operation of section 1247(d). 494 U.S. at 8, 16. The *Preseault* Court declined to decide whether a taking had actually occurred because the

(Continued on following page)

That is petitioners' takings claim. What happens between issuance of the NITU and conversion of the railroad easement to trail use is irrelevant to that claim. Issuance of the NITU did not interfere with any property interest because, "[u]nder Missouri law, ... [petitioners'] land was still burdened by the railroad easement when the NITU was issued." *Illig v. United States*, 67 Fed. Cl. 47, 51 (2005).[2] Issuance of the NITU, therefore, cannot support the Federal Circuit's blanket rule or its ruling here.

But even if the NITU interfered with a property interest when issued, that interference would be irrelevant to petitioners' takings claim (and to all other Trails Act takings claims) because it would differ in at least two critical respects from the only interference for which petitioners seek compensation: (1) the NITU's interference would be temporary (lasting only for the duration of the negotiation period), whereas section 1247(d)'s interference is

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plaintiffs had not yet sought compensation under the Tucker Act. *Id.* at 11-17.

[2] The government asserts that petitioners "do not dispute that, in this case, 'the easement would otherwise have been abandoned' under state law 'before or during' the period in which the NITU was in effect." Opp. 10 n.5. That is not only an inaccurate description of the petition, but also contrary to the law of the case and contrary to decision of the Eighth Circuit in a case involving the same property and the same NITU as this case. *Grantwood Village v. MoPac*, 95 F.3d 654, 659 nn.5-6 (8th Cir. 1996) ("Even if we examine Missouri law, we nevertheless conclude that state law does not mandate a conclusion that the right-of-way has been abandoned" at the time the NITU issued.).

permanent; and (2) the NITU's interference would not create a right to use the land as a trail, whereas section 1247(d)'s interference would. Accordingly, the government is simply wrong when it asserts, "To the extent the government's action results in a taking of property, it is a 'single taking' of a 'single reversionary interest.'" Opp. 12 (quoting *Caldwell*, 391 F.3d at 1235, and *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006)) (citation omitted). For the two reasons just stated, section 1247(d) affects different property rights from those affected by the NITU (if any). *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).[3]

B. Adopting the Federal Circuit's view, the government argues that petitioners' takings claim accrued when the NITU issued because "[i]ssuance of the NITU ... marked the moment at which federal law (1) at least temporarily, forestalled the vesting of any state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement." Opp. 10. Neither of these consequences of the NITU, however, suffices to effect the taking for which petitioners seek compensation.

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[3] The colloquial language of "blocking" the "reversion" might obscure these crucial differences between the effect of the NITU's issuance and the effect of section 1247(d)'s operation upon conversion of the railroad easement to trail use pursuant to the trail-use agreement.

The government's first point is both wrong and irrelevant for reasons just explained: the issuance of the NITU did not here and often would not, under applicable state law, interfere with any property right; and even if it did, that interference would be fundamentally and meaningfully different from the interference for which petitioners seek compensation.

The government's second point is self-defeating. Because when the NITU issues the indefinite preclusion of the reversion of the easement is, as the government admits, "contingent on the finalization of an interim trail use agreement," that preclusion, by definition, cannot yet have occurred. If the negotiation fails, the railroad easement is abandoned but not converted to trail use; thus, section 1247(d) never operates to preempt abandonment. Indeed, at one point the government says, "*Caldwell* ... held that a 'permanent taking' may be consummated once 'a trail use agreement is reached and abandonment of the right-of-way is effectively blocked.'" Opp. 14 (citation omitted) (quoting *Caldwell*, 391 F.3d at 1234). *Precisely*. If the permanent taking of a trail easement is not "consummated" until the trail-use agreement is executed, then it follows that the associated takings claims cannot accrue until then either. A government act is necessary but not sufficient to effect a "taking" of property; there must

also be an actual interference with property. Pet. 17, 24-25.[4]

C. Trying to blur the difference between the temporary taking that might occur upon issuance of the NITU and the permanent physical taking that occurs upon execution of the trail-use agreement, the government asserts: "Unlike the usual physical invasion case, the landowner in a Trails Act takings case is already deprived of possession and control over the property; the decision to authorize interim trail use of a railroad right-of-way, subject to later reactivation of rail use, represents a change in the set of applicable regulatory conditions, but it does not result in a new deprivation of possession and control." Opp. 11. Read literally, this statement might be true, particularly where, as here, the easement would not have terminated under state law when the NITU issued.

But the statement is certainly incorrect if the government means to suggest also that the only effect

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[4] Noting petitioners' citation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the government declares: "To the extent petitioners contend that a Trails Act takings claim should be conceptualized not as the blocking of reversionary interests but as the subsequent physical invasion of the easement by the public, that contention does not find support in this Court's cases." Opp. 11 n.6 (citation omitted). Petitioners do not so contend. *Loretto* shows that when the government conditions its interference on a subsequent private act, that interference does not occur, and thus the takings claim does not accrue, until that private act occurs. Pet. 25.

of section 1247(d) is to change applicable regulatory conditions. Section 1247(d) operates upon execution of the trail-use agreement to burden the land permanently with a trail easement. But for operation of section 1247(d), the land would be entirely unencumbered by an easement – the NITU-sanctioned negotiation would end, the railroad easement would be abandoned, and the property would revert to the underlying landowner.

The government also argues: "The fact that any taking may later prove to have been temporary is irrelevant; as the court of appeals has explained, 'it is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.'" Opp. 13 (quoting *Caldwell*, 391 F.3d at 1234) (brackets omitted). Indeed, petitioners have acknowledged that if a taking was initially permanent and then was cut short, the takings claim – whether for a permanent or temporary taking – might accrue at the time of the initial, ostensibly permanent interference. Pet. 31 n.4. But that is not how the Trails Act process works and not what happened here.

First, if the railroad easement would not have terminated under state law when the NITU issued, then the NITU's issuance might not interfere with a property right at all – temporarily or permanently. Second, even if the issuance of the NITU interfered with a property interest, that interference would differ fundamentally from the interference caused by section 1247(d) upon execution of the trail-use

agreement because only the latter interference creates an easement for trail use. And third, even if the NITU imposed the same burden upon the land as section 1247(d), the sequence would be the reverse of what the government described: an initially temporary interference would become permanent. Petitioners previously showed why a permanent takings claim does not accrue at the time of the initial, ostensibly temporary interference. Pet. 29-31.[5]

II. The Decision Below Conflicts with Other Appellate Decisions

The government denies that the Federal Circuit's ruling here conflicts with its ruling in several earlier cases or with the ruling in *National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135 (D.C. Cir. 1998), arguing that in none of those cases did the court expressly "address[ ] the question when a Trails Act takings claim accrues." Opp. 13-15. But

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[5] The government says petitioners "accept[ed] the proposition that the NITU marks the 'finite start' of their claim based on the preclusion of reversionary interests." Opp. 13. On the contrary, petitioners obviously contend the interference for which they seek compensation did not occur until section 1247(d) operated upon execution of the trail-use agreement. Petitioners clearly accepted the government's proposition only *arguendo*: petitioners' "takings claim would be timely *even if* their *per se* physical takings claim accrued simultaneously with their putative temporary takings claim accrued." Pet. 31 (emphasis added).

the analysis in those decisions clearly conflicts with the Federal Circuit's ruling here. Pet. 31-34.

III. The Decision Below Has Created Significant Practical Problems

The government strains to downplay the significant, intractable practical problems created by the Federal Circuit's blanket rule. The government says it "is not aware of any currently pending case that is subject to dismissal under *Caldwell*." Opp. 16. Yet, the claims of fifteen plaintiffs in *Fauvergue v. United States* recently fell victim to *Caldwell*'s blanket rule. 86 Fed. Cl. 82, 85-86, 94 (2009).[6] Further, the effect of that rule is not limited to whether a claim is timely. It also affects who has standing (only the owner as of the date of the taking), the value of the property taken (calculated as of the date of the taking), and the amount of prejudgment interest (begins to accrue on the date of the taking). *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001);

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[6] There, a class complaint was filed within six years of the NITU's issuance. More than six years after issuance but less than six years after the trail-use agreement, fifteen members of the putative class moved to be joined as named plaintiffs. The court dismissed those claims because they were untimely under *Caldwell*, and, the court held, the limitations period for putative class members could not be tolled upon the filing of the class complaint in light of *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). The tolling question is now before the Federal Circuit, but its resolution will not affect the timeliness of the Illigs' complaint.

United States v. Dow, 357 U.S. 17, 22 (1958). These issues must be resolved in every Trails Act takings case. There are dozens of pending Trails Act cases involving hundreds of landowners. Just in the five months since this petition was filed, at least seventeen Trails Act takings complaints involving more than 120 landowners were filed in the Court of Federal Claims.[7]

The government contends that the "one-size-fits-all 'bright-line rule'" established in *Caldwell* and applied here "has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires." Opp. 15. That is incorrect. A blanket rule that all Trails Act takings occur at the time of the trail-use agreement would afford equal certainty to claimants but would also accord much better with established and fundamental principles of takings law and jurisdiction than the Federal Circuit's rule, thus avoiding the other problems discussed here.

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[7] *American Country Institute, Inc. v. United States*, No. 09-163; *Asmussen v. United States*, No. 09-129; *Buford v. United States*, No. 09-121; *Burgess v. United States*, No. 09-242; *Carolina Plating Works, Inc. v. United States*, No. 09-152; *Capreal v. United States*, No. 09-186; *Ericksen v. United States*, No. 09-22; *Geneva Rock Prods., Inc. v. United States*, No. 08-920; *Gregory v. United States*, No. 09-114; *Haggart v. United States*, No. 09-103; *Dana R. Hodges Trust v. United States*, No. 09-289; *Jenkins v. United States*, No. 09-241; *Longnecker Property v. United States*, No. 09-173; *Rasmuson v. United States*, No. 09-158; *Rhutasel v. United States*, No. 09-159; *Whispell v. United States*, No. 09-315; *Ybanez v. United States*, No. 09-172.

Indeed, the Federal Circuit's blanket rule has the singular *vice* of generating substantial confusion among claimants, the government, and the lower courts, which has increased even since the petition was filed. For example, in *Pankratz v. United States*, No. 07-675 (Fed. Cl.), the court is trying to apply the Federal Circuit's bright-line rule to a situation in which a NITU was issued and expired, and then a second NITU was issued to a different prospective trail operator, who reached a trail-use agreement with the railway. Although *Barclay* held that the "original" NITU initiated a "single and continuous government action," 443 F.3d at 1375, the government maintains that the *Pankratz* plaintiffs' takings claims accrued when the second NITU issued. Reply App. 2a-11a (Def.'s Mem. in Supp. of Its Cross-Mot. for S.J. and Opp'n to Pls.' Mots. for Partial S.J. 7-8, 12-16, *Biery v. United States*, No. 07-693, and *Pankratz* (Fed. Cl. June 2, 2008) (consolidated)).

And in *Ladd v. United States*, No. 07-271 (Fed. Cl.), the plaintiff brought a takings claim arising out of the issuance of a NITU even though a trail-use agreement has not been reached. Like petitioners, the government has argued there that the NITU standing alone did not "grant[ ] anyone the authority to enter the property" or otherwise result in a "physical occupation." Reply App. 15a (Tr. of Proceedings 58 (May 19, 2009)). Judge Hodges, echoing Judge Bruggink, lamented recently in *Ladd* that "the case law that's out there [is] sort of unhelpful in some respects or worse than unhelpful in fact" and had

"[m]uddled" the issues before him. Reply App. 13a-15a (Tr. of Proceedings 4, 38).

That this Court denied review of *Caldwell* and *Barclay* does not militate against reviewing the ruling here because, among other reasons, the intractable practical consequences of those decisions had not yet manifested.

CONCLUSION

For the reasons stated above and previously, the petition for a writ for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES
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DOROTHY L. BIERY, et al., and JERRAMY PANKRATZ and ERIN PANKRATZ, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:07-cv-693 (consolidated with: Case No. 07-675L) Honorable Nancy B. Firestone (Filed June 2, 2008)

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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* * *

III. FACTUAL BACKGROUND

A. The Right-of-Way at Issue in *Pankratz*

The property at issue in *Pankratz* is a 10.6-mile right-of-way that extends between milepost 483.62 in Augusta, Kansas and milepost 494.22, near Andover, Kansas. The rail line was originally constructed by the St. Louis, Wichita & Western Railway Company ("SLW&W") and formed a part of the Oswego to Wichita line. Def. Ex. 3 at 3 (Historic Report). The railroad acquired its interests in the segments of this 10.6-mile right-of-way that are at issue in this case by means of two written instruments. The first is the condemnation instrument, which includes [7]

segments of the subject right-of-way that abut the lands allegedly owned by the six Plaintiffs.[9] *See* Def. Ex. 10 at ¶ 5 (Pankratz Straup Decl.); *id.*, Ex. 10-1) The second is a quitclaim deed by which the railroad acquired a portion of the right-of-way that abuts the property owned by Plaintiff Colling. *Id.*, Ex. 10-2.

Construction of this railroad began in 1879 and was completed by May 1880. Def. Ex. 3 (Historic Report). Through a series of railroad mergers, ownership of the subject right-of-way was transferred to the Burlington Northern Santa Fe Railway Company ("BNSF") in 1995. *Id.* In 2001, Butler County (the "County") acquired the railway line by donation from the BNSF. The County intended to rehabilitate the line and locate an operator in order to preserve the rail service in the area. *Id.* at 1. When the County was unable to locate an operator, it filed a Notice of Exemption under 49 C.F.R. § 1152.50 seeking authority to abandon the 10.6 miles of rail line. *See* Pankratz Pls.' Proposed Facts, Tab M. The exemption became effective on August 4, 2004, meaning that on that date, and absent any further orders from the STB, the County would be authorized to abandon the rail line. *Id.*

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[9] The named Pankratz Plaintiffs have indicated that they plan to file a motion for class certification but have not done so yet. Plaintiffs' motion for partial summary judgment is limited to the claims of the named Plaintiffs, as is this cross-motion.

Before the County exercised its authority to abandon the line, Prairie Travelers, Inc. ("PTI") expressed an interest in negotiating a railbanking and interim trail use agreement with the County. The County agreed to negotiate and, on September 14, 2004, the STB issued a NITU which provided a 180-day period during which the parties could negotiate a voluntary agreement. *Id.*, Tab C. However, Butler County and PTI were unable to reach such an agreement, the NITU expired on March 13, 2005, and the County was once again fully authorized to abandon the line. [8] *Id.* Tab C at 2.

On May 2, 2005, Butler County Economic Develop ("BCED"), late-filed a request for the issuance of a second NITU.[10] *Id.*, Tab D. Because the County had not yet abandoned the line and agreed to negotiate a railbanking agreement, the STB issued new NITU on June 2, 2005. On June 3, 2005, the county and BCED executed a trail use/railbanking agreement for the line.[11] *See* Def. Ex. 21.

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[10] In Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the STB retained the policy of accepting filings after the due date when good cause is shown.

[11] Defendant has been informed by BCED that BCED plans to request a voluntary partial revocation of the NITU. However, as of the date of the brief, no such request has been filed with the STB. Defendant raises this issue to alert the Court that, in the event the Court concludes Defendant is liable for a permanent taking on the facts presented, a partial revocation of the NITU would render that taking temporary. No temporary

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2. The Pankratz Plaintiffs' Takings Claims Accrued on June 2, 2005

In their first Amended Complaint, the Pankratz Plaintiffs alleged that a taking of their property "occurred when the STB issued the NITU on June 1, 2005." Pankratz Amended Compl. ¶ 29. Plaintiffs subsequently sought leave to "amend the date of the Notice of Interim Trail Use to reflect the original Notice of Interim Trail Use issued by the Surface Transportation Board on September 13, 2004. (Currently the Complaint references the STB's extension of this NITU, which occurred on June 1, 2005)." Pankratz Pls.' Mot. for Leave to Amend at 2 (Apr. 10, 2008) (Doc. 28). Contrary to Plaintiffs' assertions, the second NITU by the STB was not an "extension" of the original NITU but a new NITU issued after a lapse in time when initial Trails Act negotiations had failed. As explained below, there is a gap in time between the two NITUs during which there was no regulatory restriction that precluded the County from abandoning the subject rail line. Plaintiffs' analysis improperly ignores this fact.

Specifically, as a result of the Notice of Exemption filed by Butler County with the STB, the County was authorized to abandon the subject rail

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takings claims have been made and do not presently exist and therefore, Defendant will not address the merits of any such claim.

line as of August 4, 2004, when the Notice of Exemption became effective. Pankratz Pls.' Proposed Facts, Tab C (Doc. 33-2) and Tab M (Doc. 33-3). A potential trail operator, PTI, subsequently requested the issuance of a NITU. At that point, the County indicated that it had not exercised its authority to abandon the line, and that it was willing to negotiate for trail use with PTI. Accordingly, the STB issued the requested NITU on September 14, 2004. *Id.*, Tab C. That NITU provided the County and PTI until March 13, 2005, to negotiate a railbanking and interim trail use agreement. *Id.*, Tab C. If no such agreement was reached by that date, the NITU provided that "the County may fully abandon the [13] line." *Id.*, Tab C.

The County and PTI failed to reach an agreement. *Id.*, Tab D (Doc. 33-2). Consequently, the NITU expired and the County was once again authorized to fully abandon its line. *Id.* Accordingly, as of March 13, 2005, there was no longer any regulatory restriction in place that prevented the County from abandoning its rail line. This remained the case until June 2, 2005, when the STB issued a new NITU that authorized the County and BCED to negotiate a railbanking and interim trail use agreement. The County and BCED notified the STB that they had reached such an agreement on June 3, 2005, and the right-of-way has remained railbanked since that time. Def. Ex. 9 (Letter of June 3, 2005).

The Pankratz Plaintiffs assert that their permanent physical takings claims accrued on September 13, 2004, the date of the first NITU.[9] Pankratz Brief at 25-31. This assertion is premised on Plaintiffs' argument that, under the rulings in *Caldwell, Barclay* and *Renewal Body Works*,[10] takings claims arising under the Trails Act accrue "upon the STB's issuance of the *original* NITU." Pankratz Brief at 29 (emphasis added). However, Plaintiffs' analysis fails to consider the lapse of time between the expiration of the first NITU and the issuance of the second NITU, and the fact that two different trail sponsors were involved. These facts distinguishes this case factually from the decisions relied on by Plaintiffs.

In *Caldwell,* the "original" NITU was issued on August 31, 1994, for 7.4-mile segment of [14] a railroad right-of-way. 391 F.3d at 1231. Prior to the expiration of the 180-day negotiating period, the parties filed for an extension of time to continue their negotiations and also asked that the NITU be extended to

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[9] There is no temporary takings claim presently before the Court in this case. The Pankratz Plaintiffs did not allege a temporary taking of their properties based on the first NITU (issued September 14, 2004) in their Second Amended Complaint, nor have they moved for summary judgment with respect to such a claim. Accordingly, Defendant has not attempted herein to address the merits of such a claim.

[10] The separately filed appeals in *Barclay v. United States* and *Renewal Body Works, Inc. v. United States* were consolidated before the Federal Circuit for oral argument and decision. *See Barclay*, 443 F.3d 1368 (Fed. Cir. 2006).

cover an additional 3.2-mile segment of the same right-of-way. *Id.* The STB granted both requests and, on June 2, 1995, issued a new NITU that consolidated the proceedings involving both segments. *Id.* Having determined that the *Caldwell* plaintiffs' claims accrued on the date a NITU is issued, the Federal Circuit held that the plaintiffs' claims were barred by the applicable statute of limitations because both NITUs were issued more than six years before the plaintiffs filed their complaint. *Id.* at 1235.

In *Barclay,* the plaintiffs sought to avoid the dismissal of their claims as time-barred under *Caldwell* by arguing that the original NITUs issued for the "Flint Hills" trail were vacated and that a second taking occurred when a new NITU was issued naming a new trail operator. *Barclay,* 443 F.3d at 1374. After explaining that the substitution of trail users is contemplated as part of the railbanking, the court rejected the plaintiffs' claim accrual argument, noting that "[t]here is no gap between the original and replacement NITUs. Though formally 'vacat[ing]' the original NITUs, the STB makes clear that, in substance, it is 'substituting' trail users 'in the [same] proceedings.' " *Id.* at 1375. Accordingly, the *Barclay* decision clarifies that "any extensions or modifications of the original NITU [are] not separate potential takings."[11] *Id* at 1376.

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[11] The *Barclay* court reached the same conclusion as to the Sunflower Trail, where a request to extend the negotiating

(Continued on following page)

In contrast to the factual scenarios presented in *Caldwell* and *Barclay,* the first NITU issued in *Pankratz* expired according to its terms on March 13, 2005. As a result of the [15] expiration of that NITU, with no pending request for an extension of the negotiation period, the railroad was fully authorized to consummate abandonment of its rail line as of March 13, 2005. As the Federal Circuit explained in *Caldwell,* under these circumstances, any takings claim that accrued with the issuance of the first NITU was, at most, a temporary one. *See Caldwell,* 391 F.3d at 1234 ("negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred."). *See also* Creppel v. United States, 41 F.3d 627, 632-34 (1994) (finding that the government's regulatory actions involving the plaintiffs' properties gave rise to a temporary takings claims preceding and separated by a 4-month gap from a permanent takings claim)

Although the County was authorized to fully abandon, it did not exercise that authorization and consummate the abandonment. Instead, approximately 2½ months after the original NITU expired, the

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period and substitute a new trail operator was filed on the date the original NITU was set to expire. The court rejected the argument that the NITU issued in response to this request (which came 10 days later) resulted in the accrual of a new takings claim, and found instead that the second NITU "in substance merely extended the original NITU." *Id.* at 1376.

County – acting through its Economic Development office – requested the issuance of anew NITU. Def. Ex. 6 (Letter of Apr. 4, 2005); see also Def. Ex. 7 & 8 (Letters of May 16 and May 23, 2005). The STB issued a new NITU on June 2, 2005, a Trails Act agreement was reached, and the 10.6-mile right-of-way is now railbanked. Accordingly, under *Caldwell*, the second NITU gives rise to a potential permanent takings claim. *See Caldwell*, 391 F.3d at 1234 ("the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked").

In sum, any takings claim that accrued with the issuance of the first NITU was rendered temporary when that NITU expired according to its own terms on March 13, 2005. After that date, there was no regulatory restriction in place that affected, in any way, the County's right to fully abandon its lines or precluded the vesting of any state law reversionary interests. *Caldwell*, [16] 391 F.3d at 1233-34. The subsequent issuance of a new NITU on June 2, 2005, which resulted in a railbanking and interim trail use agreement, thus gives rise to a permanent takings claim that relates back (and accrues on) June 2, 2005. Accordingly, the correct claim accrual date for the permanent takings claims alleged in Plaintiffs' Second Amended Complaint and on which Plaintiffs

have moved for partial summary judgment is June 2, 1995, the date on which the second NITU was issued.

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IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

JACK LADD AND MARIE LADD ET AL.,	)	
Plaintiffs,	)	
v.	)	Docket No.: 02-271L
UNITED STATES,	)	
Defendant.	)	

Courtroom 7, Room 508
National Courts Building
711 Madison Place, N.W.
Washington, D.C.

Tuesday, May 19, 2009

The parties met, pursuant to notice of the Court, at 10:06 a.m.

BEFORE: HONORABLE ROBERT H. HODGES, JR. Judge

APPEARANCES:

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* * *

[4] MS. JACKSON: That's okay. Ms. Fisher isn't here. Ketanji Jackson of Morrison & Foerster on behalf of Rails to Trails Conservancy.

THE COURT: Okay. All right, Ms. Jackson. Morrison & Foerster?

MS. JACKSON: Yes, sir.

THE COURT: Okay. Well, this is a case that has haunted me for some time, and I apologize once again for not having disposed of this before now. I think I told you on the phone we have an opinion ready to go. The problem is we're just not quite satisfied that it's right frankly. The case has subtleties to it that keep reappearing, and as you folks well know, there's no case quite like this one, which we think makes a

big difference in the facts of this case that we find make the case law that's out there sort of unhelpful in some respects or worse than unhelpful in fact.

So I'm hoping that perhaps you folks who have lived with it a lot longer than I have will be able to help me get some of these issues straightened out. I may go a little bit out of normal practice on occasion to ask for direct comment on a particular assertion if you don't mind. I told the clerks earlier that I don't normally do that, and it seems.

* * *

[38] [MR. HEARNE:] So even though in that case we have a group of people who owned the land when the trail was built and they had no compensation and were excluded from the case. But the people who owned the land on the date the NITU was issued, even though they no longer owned it when the trail was built, were fully compensated because it was their reversionary interest that was taken.

So that's why I say this case seems novel in the sense that, no there's not a trail there, but it isn't at all novel on the fundamental issue which is common to every trails case, which is the taking of reversionary interests is the feature of the compensatable interest. When we focus on that, *Caldwell, Barkley, Preseault,* all the cases make sense at least to me. It's when I try to separate the two concepts and look at the trail as a feature of the taking that it becomes a little more muddled.

THE COURT: Muddled is a good way to describe the problems that we had. You have a better computer than I do, I had forgotten about *Carl Junction*. But you say it was stipulated there, that – doesn't sound like I published it, is that right?

* * *

[58] THE COURT: I guess the difference would be that *Tahoe* was a regulatory taking, but you're saying that's what this is too?

MR. GETTE: That's what this is too. We have no physical occupation, the sole action of the government was to say, everybody take a breath, hold off on any further development, the government did not enter the property, the government never granted anyone the authority to enter the property. The only party that has the authority to enter the property is the Railroad, and that derives from the easement that they were granted 100 years ago.

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